Supreme Court, U. S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term, 1979

No. 79-1447

FREDERICK B. EISEMAN, JR.,
MARGARET EISEMAN, J. R.
HERTZLER and MICHAEL ST. CLAIR, Petitioners,

v.

SECRETARY OF THE INTERIOR,
DIRECTOR OF THE NATIONAL
PARK SERVICE and
SUPERINTENDENT OF GRAND
CANYON NATIONAL PARK, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 16, 1980

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SECRETARY OF THE INTERIOR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Frederick B. Eiseman, Jr., *et al.*, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 1, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, attached hereto. The Order of the Court of Appeals denying the Petition for

Rehearing is also set forth in the Appendix. The opinion of the United States District Court for the District of Arizona is reported at 433 F. Supp. 1103 (D. Ariz. 1977).

JURISDICTION

The opinion of the Court of Appeals was filed on November 1, 1979. On December 17, 1979, a timely petition for rehearing was denied. This petition for certiorari was filed within 90 days of that date. The Court has jurisdiction of this matter under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Organic Park Act, 16 U.S.C. §3 and the Concessions Policy Act, 16 U.S.C. §20, prohibit the Secretary of the Interior from granting a preference for recreational boating usage of the Colorado River in Grand Canyon National Park to those purchasing commercial services?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 16:

> §3
> [N]o natural curiosities, wonders or objects of interest shall be leased, rented or granted to anyone on such terms as to interfere with free access to them by the public . . . .
>
> §20
> It is the policy of the Congress that such development [concessions] shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located . . . .

PARTIES AND DECISION BELOW

Two related cases were consolidated in the proceeding before the Court of Appeals. This action originated in the United States District Court of Arizona; the other action was filed in the Northern District of California.

The petitioners herein, Frederick B. Eiseman, Jr., Margaret Eiseman, J. R. Hertzler and Michael St. Clair, unsuccessfully sought private River trip permits. Because the respondents adopted restrictions on the number of private permits which would be granted, in the manner complained of herein, their applications were denied. The respondents are the Secretary of the Interior, the Director of the National Park Service and the Superintendent of Grand Canyon National Park.

The opinion below affirms the authority of the Secretary of the Interior (Secretary) to grant a preference in recreational boating use of the Colorado River in Grand Canyon National Park to those purchasing commercial services. The Court of Appeals found that the decision of the Secretary allocating usage of the River in favor of those choosing to travel with concessioners was "within the area of administrative discretion granted to the NPS [National Park Service]."

STATEMENT OF THE CASE

This action was filed pursuant to the Administrative Procedure Act, 5 U.S.C. §702 *et seq.* and the Declaratory Judgment Act, 28 U.S.C. §2201 *et seq.* The jurisdiction of the District Court was invoked under 28

U.S.C. §1331(a), in that the action arose under the Constitution and laws of the United States and was brought against officers and employees of the United States.

This controversy originated because of a decision made by the respondents in 1972 establishing an allocation formula affecting recreational boating usage of the Colorado River as it travels through Grand Canyon National Park. In response to increasing use of the River, the National Park Service (Park Service) in 1972 placed a limit on the total usage to begin in 1973. In addition, the Park Service froze the allocation of usage to reflect that actually experienced in 1972. During 1972, 92% of the usage on the River was by commercial operators and 8% by private "river runners." (R.34)[1]

Recreational boating activities on the River are divided into two categories. As explained more fully below, most of the usage is reserved to those who purchase services from the many concessioners operating on the River. The limited amount of usage which remains is allocated to those who travel with private parties without commercial assistance. In order to obtain a private permit, one must meet the safety and environmental standards established by the Park Service. (R.71-85)

From the outset, it was the position of the Park Service that the quota system allocating usage between private and commercial usage would be only temporary. (R. 40) In fact, however, in early 1973 a research program addressing ecological and sociological issues

[1] "R" indicates reference to the record on appeal.

was initiated; the results were not completed until early 1977. (R. 34) The summary of that research program was published in a proposed Colorado River Management Plan in late 1977. The formula granting preferential treatment to commercial users was maintained from 1973 through 1979.

While this matter was pending before the Court of Appeals, the final Colorado River Management Plan for Grand Canyon National Park was adopted. Under the final Plan, by 1982 70% of usage will be allocated to concessioners; 30% of usage will be allocated to noncommercial users. NATIONAL PARK SERVICE, COLORADO RIVER MANAGEMENT PLAN FOR GRAND CANYON NATIONAL PARK 20-22 (1979).

The commercial concessioners who control 70% of the recreational boating usage on the River operate their activities much in the same manner as other commercial services do in the Park and in national parks and other recreational areas under state and federal management throughout this country.

Unlike a commercial trip, however, a private trip is participatory, and all expenses, trip preparation and conduct of the trip must be shared by members of the group. (R. 84) Private River trips are comparable to other noncommercial activities throughout our national parks and in other federal and state recreational areas.

The decision to grant continued preference to those purchasing commercial services is not based upon environmental considerations. The research program carried out by the Park Service was not designed to yield, nor did it yield, any objective information which

could be used to establish allocations between user groups.[2] (R. 170-72)

As River trips have become more popular there has been an increasing demand for permits in both the commercial and private sectors. The demand for private river trip permits, however, has dramatically increased from 47 applications in 1972 to 425 applications in 1976. NATIONAL PARK SERVICE, DRAFT ENVIRONMENTAL STATEMENT, PROPOSED COLORADO RIVER MANAGEMENT PLAN, II-42 (1977). During this same period, however, by virtue of the continued enforcement of the 1972 allocation formula, the number of private River trip permits actually granted declined form 47 to 36. *Id.*

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[2] While this matter was before the District Court, the petitioners deposed Howard Chapman, the Western Regional Director of the National Park Service. Mr. Chapman was directly involved in the development and implementation of the allocation formula which gave rise to this action and was familiar with the River research program. His testimony demonstrates that the research had no relationship to allocating usage between commercial and noncommercial users.

Q. Is it your contention that the purpose of the research was to evaluate the environmental impact of private use versus commercial use?

A. No, that—that research was designed to give us information on environmental as well as sociological impact of use, total use on the river. P. 14

* * *

A. "All carrying capacity research on rivers where use now occurs shall be completed by December 31, 1977. It cannot resolve socio-economic arguments about the decision of available time and space or evaluation of the relative merits of different user groups. To a certain degree, some management decisions must always be subjective."

* * *

Q. That is a fair and accurate statement, isn't it?

A. Yes. P.19

The petitioners do not seek a priority in usage over those persons who choose commercial services. This action seeks to achieve a system of equal access in which all persons who desire to travel on the River would apply directly to the Park Service and then be chosen on some fair basis. Such a system would be administratively feasible, according to Park Service officials. Deposition of Howard Chapman, *supra* at 47.

There is absolutely no precedent for establishing preferential treatment for commercial uses. Mr. Chapman testified in his deposition that other commercial services provided in the Grand Canyon are operated on an equal access basis and no allocation of usage between commercial concessioners or private individuals is made.

> Q. * * * [I]s there any other analogy in the Grand Canyon where there is an allocation of use between private and commercial use—
>
> A. [Mr. Chapman] No.
>
> Q. In other words, the commercial services exist to meet the demands for their services from the public and the public has the choice of going on their own or using the commercial operator, isn't that right?
>
> A. That's right.
>
> * * *
>
> Q. But you don't say a certain number of people must stay in the campground and no more than that and everyone else must stay in the lodge; you don't say that, do you?

A. We say that these are the services that are available and the public has their choice between those.

Q. And the lodge takes the risk concerning the number of people who may stay overnight on any particular evening?

A. Correct.

Q. You don't guarantee a certain amount of people will come into the lodge?

A. No, we don't. PP. 43-45

Because the petitioners were among the many thousands of Americans who unsuccessfully sought private River trip permits, they filed this action seeking to determine the legal authority and jurisdiction of the respondents to establish an allocation formula which grants preferences to one class of users over another.[3]

In spite of petitioners' argument that 16 U.S.C. §§3,20 barred the respondents from so acting, the Court of Appeals held that users of commercial services may be granted a preference because "if the rights of all are to be recognized, then the 'free access' of any user must be limited to the extent necessary to accomodate the access rights of others."

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[3] Before the Court of Appeals, petitioners argued that the allocation formula violated their rights under the 5th Amendment of the United States Constitution and further violated 5 U.S.C. §553. Petitioners do not present these arguments in this petition.

REASONS FOR GRANTING THE WRIT

1. **The decision below violates the Organic Park Act, 16 U.S.C. §3 and the Concessions Policy Act, 16 U.S.C. §20.**

Federal legislation regulating the role of commercial activity in national parks prohibits the preferential formula adopted by the Park Service. The opinion below is in conflict with the Organic Park Act, 16 U.S.C. §3, and the Concessions Policy Act, 16 U.S.C. §20; the opinion of the Court of Appeals failed to properly consider the actions of the respondents in light of the foregoing statues.

It is fundamental that publicly-owned lands should be accessible to all citizens on an equal basis and without restrictions such as requiring, for all practical purposes, the use of commercial services in order to enjoy scenic and wilderness areas. This principle is contained in the legislation establishing the National Park System and in the more recent Concessions Policy Act.

> [N]o natural curiosities, wonders, or objects of interest shall be leased, rented or granted to anyone on such terms as to interfere with free access to them by the public .... Organic Park Act, 16 U.S.C. §3.
>
> * * *
>
> It is the policy of the Congress that such development [concessions] shall be limited to those that are *necessary and appropriate* for public use and enjoyment of the national park area in which they are located .... Concessions Policy Act, 16 U.S.C. §20. (Emphasis added)

A central idea in establishing the National Park System was to prevent commercial control of areas containing natural wonders. The Organic Park Act, 16 U.S.C. §1 *et seq.*, which established the National Park Service, followed 12 "special" laws creating individual parks beginning with Yellowstone Park in 1872.

Throughout this period there was frequent debate over the situation at Yosemite Park where private landowners established toll roads requiring the payment of a fee by the public as a condition for access to certain sites in the Park. CONG. GLOBE, 42d Cong., 1st Sess. 697 (Jan. 30, 1872); SECRETARY OF THE INTERIOR, REPORT FOR THE FISCAL YEAR ENDING JUNE, 30 1905 167-8 (1905); J.ISE, OUR NATIONAL PARK POLICY, A CRITICAL HISTORY 76-80 (1961). And during the period immediately prior to the establishment of Yellowstone Park, there was significant public concern over the situation at Niagra Falls where private landowners were charging tourists to view the Falls. Sax, *America's National Parks: Their Principles, Purposes, and Prospects.* NATURAL HISTORY 64 (Supp. Oct. 1976).

The Organic Park Act passed the 64th Congress as H.R. 15522. The Congressional debates and hearings on the bill, however, make no reference to language ultimately adopted in 16 U.S.C. §3 which provides for "free access." 53 CONG. REC. 10363-365, 12150-152, 13004-5 (1916); H. Rep. 700, 64th Cong., 1st Sess. (1916); S. Rep. 662, 64th Cong., 1st Sess. (1916). Based upon petitioners' review of the history preceding the development of the National Park System, the free access requirement must have been intended to prohibit commercial interests from controlling access to

park areas. By granting concessioners preferential usage of the River, the respondents have, in fact, conditioned most of the boating activities on the River upon the purchase of commercial services.

Fifty years later, Congress carefully reviewed concessioner policies throughout the Park System and codified many of the practices which had developed over the years. Concessions Policy Act, 16 U.S.C. §20 *et seq.* Prior to the actions complained of herein it had always been Park Service policy to limit commercial services to only those which were *necessary* for public use.

> [I]t shall be the policy of the Department [of the Interior] to permit the development of accomodations within the areas administered by the National Park Service only to the extent that such accomodations are necessary and appropriate for the public use and enjoyment of the areas, . . . Concessions Policies of the National Park Service, May 6, 1950, reprinted in *Park Concession Policy, Hearings before the Subcomm. on National Parks of the House Comm. on Interior and Insular Affairs,* 88th Cong., 2d Sess. 26 (1964).

See SECRETARY OF THE INTERIOR, REPORT FOR THE FISCAL YEAR ENDING JUNE 30, 1918 112 (1918) ("Every opportunity should be afforded the public, whenever possible, to enjoy the National Parks in the manner that best satisfies the individual taste.") The Concessions Policy Act ultimately incorporated the language stipulating that commercial services must be necessary and appropriate. 16 U.S.C. §20.

Both the Senate and House hearings on the Concessions Policy Act make clear that Congress intended that commercial services should not monopolize or dominate usage but rather be responsive to the public demand and need. The Committees which considered the bill explained the meaning of the language "necessary and appropriate" as follows:

> [W]hatever public accomodations or services have to be provided within the park system . . . *should be limited to those needed for public use and enjoyment of those areas in which they are located*. . . . H. Rep. 1426, *Relating to the Establishment of Concession Policies in the Areas Administered by the National Park Service,* 88th Cong., 2d Sess. 6 (1964); S. Rep. 765, *National Park Concession Policies* 89th Cong., 1st Sess. 5 (1965); 111 CONG. REC. 23644 (1965). (Emphasis added)

Congressman Morris K. Udall, who was extensively involved in the drafting of the Concessions Policy Act, spoke to this issue during the congressional debates:

> It has never been the National Park policy or the policy of any administration to try to jam as many concessions as possible in a park. *The idea has always been to have as few as are really needed to serve the public.* 111 CONG. REC. 23641 (1965). (Emphasis added)

Thus, the legislative history of the Concessions Policy Act makes clear that Congress intended that national park concessions ought to serve the legitimate public

demand and need. It was never the Congress' intention that commercial services would receive preferential treatment and thereby displace activities of those not needing commercial assistance.

The Court of Appeals did not give proper consideration to the foregoing statutes. The Court found that the Secretary of the Interior has "wide ranging" responsibility for managing national parks and therefore preferential treatment for commercial activities is within the Secretary's "administrative discretion."

The cases relied upon by the Court of Appeals, however, do not support this view. *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n,* 393 U.S. 186 (1968), concerned an attempt by the Transit Commission to require a concessioner operating guided tours on the Washington Mall under a contract with the Secretary of the Interior to obtain a certificate of convenience. The case turned on interpretations of several statutes and although the Supreme Court affirmed the Secretary's authority to contract for guided tour services, the opinion did not even purport to address the issue of preferential treatment for one class of users over another.

The case does, however, present a graphic opportunity to demonstrate the unlawfulness of the respondents' actions herein. Imagine if 70% of the tourists sightseeing on the Mall were required to pay a commercial guide. The obvious inequity that such a situation would create highlights the error of the actions at issue here. Just as all visitors on the Mall

should be free to choose the manner in which they will experience their visit, so should those traveling on the Colorado River be free to choose how they will experience the River.

The holding in *Udall v. Washington, Va & Md. Coach Co., Inc.*, 398 F. 2d 765 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969), concerned the Secretary's power to control commercial bus routes along George Washington Memorial Parkway. The Court upheld the power of the Secretary to permit unlimited commuter bus traffic south of Memorial Bridge but not north of it. Again, the opinion in no way addressed the authority of the Secretary to establish preferential treatment for commercial activities over noncommercial activities.

In summary, the decision below, which holds that the respondents may grant preferences and a virtual guarantee to commercial operations, is in direct conflict with the historical underpinnings of our National Park System and the clear expression of congressional will. It is respectfully submitted that the Court grant a writ of certiorari to the Ninth Circuit Court of Appeals to fully consider this significant issue affecting our entire National Park policy.

2. **The decision below raises important issues concerning the administration of the National Park System and federal administration of recreational areas throughout the United States.**

The central idea in establishing our national parks was to prevent commercial control of areas containing national "wonders" and to enable the public to enjoy these scenic areas without the necessity of paying fees

to business entrepreneurs. Although Congress has recognized that it is often necessary to provide commercial services for certain purposes, there is no precedent for the respondents' decision which arbitrarily determines what percentage of the public must use a commercial service and what percentage is free to experience one of America's great scenic attractions on its own terms.

The decision to grant concessioners preferential rights for recreational boating usage on the Colorado River has national implications. In 1978, there were over 222 million recreation visits to sites within the National Park System. *NATIONAL PARK SERVICE, NATIONAL PARK STATISTICAL ABSTRACT 1978* Table 2 (1978). The National Park System comprises 320 separate areas, covering 76 million acres in 49 states, the District of Columbia, Guam, Puerto Rico, Saipan and the Virgin Islands. Additionally, the National Park Service has jurisdiction over 23 "affliated areas," the Wild and Scenic Rivers System and the National Trail System. *NATIONAL PARK SERVICE, INDEX, NATIONAL PARK SYSTEM AND RELATED AREAS* 5, 69, 74, 78 (1979). Furthermore, the Bureau of Land Management and United States Forest Service have jurisdiction over many other recreational areas.

Outdoor recreation of all kinds has increased in popularity exponentially in the last 15 years. As more and more people crowd the available recreational areas, the managers of these areas have been forced to

impose limits upon their use. The usual procedure is for the managing agency to require permits for the use of an area and to put a limit upon the number of permits that it grants each year.

The result is fierce competition for permits between the private and commercial users of an area. And unless there is a definitive judicial declaration that grants equal opportunities for acquisition of use permits for all Americans, the commerical users will certainly acquire the vast majority of permits.

Without a mandate that affirms equality of opportunity for all the people to use the public lands, such use will be concentrated in the hands of a relatively few profit-oriented commercial concessioners. The private individual who either cannot afford[4] the services of a professional guide or who does not want such services, will be forced to pay a concessioner to do for him that which he is perfectly capable of doing and willing to do for himself—because the concessioners will have the permits and the private individuals won't.

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[4] The River research program leading up to the adoption of the River Management Plan described commercial passengers as a "select socioeconomic group. They are not representative of the American public. Commercial river runners in Grand Canyon have above average income levels, with over half of the people reporting family incomes over $24,000." Draft Environmental Statement, *supra* at II-53. Congress has expressed concern over the trend that park areas are increasingly accessible only to the wealthy. S. Rep. 765, *supra* at 6.

Of course, there is a legitimate role for commercial services in our National Park System. Some Americans would prefer to stay in a lodge rather than camp; some Americans would prefer to hire a trail guide rather than charge off into the woods on their own.

But it is fundamental that the manner in which we experience the great scenic wonders of this country ought to be left up to individual taste. To require a fixed percentage of recreationists to neccessarily pay a concessioner as a condition of enjoying these scenic areas, directly contradicts the underlying policy which led to the formation of our federal Park System.

The experience of hiking along the Appalachian Trail, or fishing at Voyageurs National Park would take on an alien pale if the trappings of commercialism were forced upon visitors. If the preference granted to commercial users at Grand Canyon is allowed to stand, commercial activities will transform the nature of the outdoor experience in this country.

The issue here is one of free choice. Those who want the assistance of concessioners should have that opportunity. Those who choose to experience nature on their own terms should also have that freedom. The decision at issue here robs Americans of that choice and unless reversed signals the doom of outdoor recreation in the National Park System.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 1, 1979.

DATED this 16th day of March, 1980.

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing petition for certiorari were mailed this 16th day of March, 1980 to:

Mr. Carl Strass
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I further certify that all parties required to be served have been served.

DATED this 16th day of March, 1980.

Bruce Meyerson

Bruce Meyerson

APPENDIX

A. Decision Below

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILDERNESS PUBLIC RIGHTS FUND, a nonprofit California corporation,
Plaintiff-Appellant,

vs.

THOMAS F. KLEPPE, Secretary of Interior, Department of the Interior, GARY EVERHARDT, Director of the National Park Service, HOWARD H. CHAPMAN, Regional Director of the Western Region of the National Park Service, and MERLE STITT, Superintendent of Grand Canyon National Park,
Defendants-Appellees.

No. 77-1606

FREDERICK B. EISEMAN, JR., and MARGARET H. EISEMAN, husband and wife; J. R. HERTZLER, MICHAEL ST. CLAIR,
Plaintiffs-Appellants,

vs.

THOMAS F. KLEPPE, in his capacity as Secretary of the U.S. Department of Interior; GARY EVERHARDT, in his capacity as Director of the National Park Service, and MERLE STITT, in his capacity as Superintendent of Grand Canyon National Park,
Defendants-Appellees.

No. 77-3693

OPINION

On Appeal from the United States District Court
for the Northern District of California; and
the District of Arizona

Before: MERRILL and ANDERSON, Circuit Judges,
and SKOPIL,* District Judge

MERRILL, Circuit Judge:

These cases involve the manner in which use of the Colorado River for rafting and boating is apportioned between concessioners approved by the National Park Service and noncommercial users. Permits from the National Park Service are required for river use and the dispute here concerns the apportionment made in granting permits.

In December, 1972, the Secretary of the Interior found that the boating and rafting use of the Colorado River in the Grand Canyon National Park had experienced such an increase that it posed a threat to the ecology of the river. A study was initiated for the purpose of ascertaining river capacity and it was decided that until completion of the study use of the river should be frozen at the 1972 level. Accordingly, river use was limited to 96,600 user days per year (a user day being one day spent on the river by one person). This total use was apportioned between two user groups in the ratio of actual 1972 use by each group: 89,000 user days or 92 percent of the total use was allotted to commercial concessioners of the Park Service who, for a fee, make guided trips through the canyon; 7,600 user days or 8 percent of the total was allotted to noncommercial users who apply for permits as private

*Honorable Otto R. Skopil, Jr., now a member of this court, was, at the time of the hearing in this matter, Chief United States District Judge of the District of Oregon, sitting by designation.

groups. Noncommercial users for the most part are experienced in river running and furnish their own equipment and supplies. Expenses are shared, as is the performance of the necessary duties involved. Permits for river use and the apportionment thereof have remained frozen at the 1972 level.

Appellants are, or represent, noncommercial river runners who, on various grounds, challenge the apportionment between commercial and noncommercial users. They assert that they, or those they represent, have applied for permits from the Park Service which were denied, the Service instead having granted permits to persons who used them for commercial purposes. In January, 1975, a member of Wilderness Public Rights Fund petitioned the Secretary for a change in the allocation system for the issuance of permits. The request was denied.

Both actions before us assert jurisdiction under the judicial review portions of the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* and the Declaratory Judgment Act, 28 U.S.C. §2201, *et seq.* The Wilderness Public Rights Fund action was brought in the Northern District of California in June, 1976. As relief it sought an injunction staying the issuance of permits for river use to commercial permittees and concessioners "until such time as it can be determined to what extent commercial services are necessary and appropriate." It sought a declaration that noncommercial users are entitled to priority over commercial users.

The Eiseman action was brought in the District of Arizona in March, 1977. It was more modest in its claims and in the relief sought. It did not seek priority for the noncommercial users over the commercial

users. It sought equal access to the river and an order directing the Secretary and the Service to implement a plan providing equal access.

In both cases summary judgment in favor of appellees was granted and these appeals followed.

A number of statues and regulations bear on the issues of these actions. 16 U.S.C. §1 creates the National Park Service (hereinafter NPS) in the Department of the Interior and directs it to "promote and regulate the use of the federal areas known as national parks, monuments and reservations * * * by such means and measures as conform to the fundamental purpose of said parks, monuments and reservations * * *." That purpose is stated to be "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

16 U.S.C. §3 provides in part:

> "The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * *. He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments or other reservations [herein provided for] but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public * * *."

Pursuant to this authority the Secretary has promulgated 36 C.F.R. §7.4(h) (3) as follows:

> "(3) No person shall conduct, lead, or guide a river trip unless such person possesses a permit issued by the Superintendent, Grand Canyon National Park. The National Park Service reserves the right to limit the number of such permits issued, or the number of persons travelling on trips authorized by such permits when, in the opinion of the National Park Service, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area."

The Concessions Policy Act, 16, U.S.C. §20 provides in part:

> "It is the policy of the Congress that such development [concessions] shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located * * *."

Appellants first attack the failure of the NPS to follow the dictates of the Administrative Procedure Act. They contend that the allocation of user days between commercial and noncommercial users amounted to rule making and that no hearings were held where the noncommercial users could present their views, contrary to the requirements of the Administrative Procedure Act.

That Act, 5 U.S.C. §553(a) (2), excepts from the rule-making procedures "a matter relating * * * to public property, loans, grants, benefits or contracts." The government contends that this exempts the action of the Secretary in freezing the 1972 river use and apportioning that use between the commercial and

noncommercial users. We agree. *Cf. Duke City Lumber Co.* v. *Butz*, 382 F.Supp. 362, 378 (D.D.C. 1974), *aff'd in part*, 539 F.2d 220 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

Appellants contend that allocation between commercial and noncommercial use of the river is not an acceptable method of accomplishing a limitation of river use. They propose that anyone wishing to run the river should apply for a permit, leaving to him, if his application be granted, the choice between joining a guided party or a noncommercial party; that permits then be granted by lottery or on a first-come-first-served basis. They assert that the record establishes that such a method is feasible. They contend that there is no justification for allocating between commercial and noncommercial use, and that to do so amounts to arbitrary action; that it denies them "free access" to the river contrary to 16 U.S.C. §3 and permits development by concession to a degree in excess of that allowed by the Concessions Policy Act. We disagree.

The Secretary of the Interior, acting through the NPS, has the wide ranging responsibility of managing the national parks. 16 U.S.C. §3. *Universal Interpretive Shuffle Corp.* v. *WMATC*, 393 U.S. 186, 187 (1968); *Udall* v. *Washington, Virginia & Maryland Coach Co.*, 398 F.2d 765 (D.C.Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969). Pursuant to this authority, the NPS regulates use of the Colorado River through the permit requirement described in 36 C.F.R. §7.4(h) (3), *supra*. In issuing permits, the Service has recognized that those who make recreational use of the river fall into two classes: those who have the skills and equip-

ment to run the river without professional guidance and those who do not. The Service recognizes its obligation to protect the interests of both classes of users. It can hardly be faulted for doing so. If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the "free access" of any user must be limited to the extent necessary to accommodate the access rights of others. We must confine our review of the permit system to the question whether the NPS has acted within its authority and whether the action taken is arbitrary. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414 (1971). Allocation of the limited use between the two groups is one method of assuring that the rights of each are recognized and, if fairly done pursuant to appropriate standards, is a reasonable method and cannot be said to be arbitrary. It is well within the area of administrative discretion granted to the NPS.

Throughout these proceedings Wilderness Public Rights Fund has persisted in viewing the dispute as one between the recreational users of the river and the commercial operators, whose use is for profit. It asserts that by giving a firm allocation to the commercial operators to the disadvantage of those who wish to run the river on their own the Service is commercializing the park. The Fund ignores the fact that the commercial operators, as concessioners of the Service, undertake a public function to provice services that the NPS deems desirable for those visiting the area. 16 U.S.C. §20a. *See, Universal Interpretive Shuttle Corp.*

v. *WMATC*, *supra*. The basic faceoff is not between the commercial operators and the noncommercial users, but between those who can make the run without professional assistance and those who cannot.

While the Concessions Policy Act, 16 U.S.C. §20, *supra*, expresses the congressional intent that the granting of concessions shall be limited to "those that are appropriate for public use and enjoyment" of the park involved, the authority for the granting of concessions is given to the Secretary by 16 U.S.C. §3, and there is no showing here of arbitrary action or abuse of that authority.

Appellants also complain that noncommercial applicants receive unfair and unequal treatment at the hands of the Service. They must apply to the Service for permits and thus must plan their trips well in advance. Deadlines must be met. The names of all in the proposed party (with signatures) must be set forth. Those who make the trip under guide may deal directly with the concessioners and make arrangements at the last minute. This comports with the NPS' right to regulate river trips in the interests of safety. 36 C.F.R. §7.4(h) (3). We find nothing unreasonable in thus assuring, as matter of safety, that those who make the trip on their own without concessioners' supervision have undertaken the necessary preparation and possess the necessary skill to participate in the activities involved.

We conclude that allocation between the two classes of recreational users is not per se an arbitrary method of recognizing and accommodating the interests of the two classes. The question remaining is whether allocation has been fairly made pursuant to appropriate standards.

There is a judicial presumption favoring the validity of administrative action. *See Duesing* v. *Udall*, 350 F.2d 748 (D.C.Cir. 1965), *cert. denied*, 383 U.S. 912 (1966). Where several administrative solutions exist for a problem, courts will uphold any one with a rational basis, but the Secretary's balancing of competing uses must not be an arbitrary one. *Udall* v. *Washington, Virginia and Maryland Coach Co., supra.*

Appellants challenge the method used by the Park Service in determining allocation between the classes of users for the reason that it is founded on 1972 data. It is asserted that since that year there has been a substantial increase in the demand for use by noncommercial users, and that to freeze allocation of use on the basis of seven-year-old data in the face of rapid change is arbitrary and unreasonable.

We are informed, however, that the study initiated by the National Park Service has now been completed and that the interim basis for allocation between the two classes of users — freezing at the 1972 level — is being abandoned. A proposed management plan for the river and a draft environmental impact statement have been completed and published. The allocation departs from the 1972 level of 92 percent user days for commercial operators and 8 percent user days for noncommercial river runners. Under the plan, 70 percent

of the user days will be allocated for commercial trips and 30 percent for noncommercial trips. The period assigned for comment has expired and it is anticipated that a final plan will be forthcoming in a matter of weeks.

This renders moot challenges to the specifics of the interim management plan, now about to be superseded by a final plan. The basis for the claim of arbitrariness — that the freezing of use and allocation of use at the 1972 levels is, in 1979, unreasonable — falls from the case.

Judgment affirmed.

B. Order Denying Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILDERNESS PUBLIC RIGHTS FUND, ETC.,
Plaintiff-Appellant,
vs.
THOMAS F. KLEPPE, ET AL.,
Defendants-Appellees.

No. 77-1606

FREDERICK B. EISEMAN, JR., ET AL.,
Plaintiffs-Appellants,
vs.
THOMAS F. KLEPPE, ET AL,
Defendants-Appellees.

No. 77-3693

ORDER

Before: MERRILL, ANDERSON and SKOPIL, Circuit Judges

The panel as constituted in the above cases has voted to deny the petition for rehearing in each of the above-entitled appeals.

On the suggestion for rehearing en banc filed by Wilderness Public Rights Fund, Judges Anderson and Skopil voted to deny the petition and Judge Merrill recommended against an en banc hearing.

The panel also decided to amend the opinion in the respect specified below.

The full court has been advised of the suggestion for an en banc hearing filed by Wilderness Public Rights Fund, and of the amendment to the opinion proposed by the panel, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing in each appeal is denied. The suggestion for a rehearing en banc filed by Wilderness Public Rights Fund is rejected. The opinion heretofore filed herein is amended, page 547 of the slip printing, line 3, by adding "necessary and" after the word "are."